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No. 97- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

ROBERT FICALORA,
Petitioner,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether conflicts of interest which may have influenced the decision of an ERISA plan administrator to deny benefits must be weighed as a factor in determining whether the decision was an abuse of discretion.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

ROBERT FICALORA,
Petitioner,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Robert Ficalora respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 15, 1997.

---

[1] The parties to the proceedings below were the petitioner Robert Ficalora and the respondents International Business Machines, Inc.; IBM Medical Disability Income Plan (MDIP); Chase Manhattan Bank, Trustee of the MDIP; J.J. Sinnott; Michael A. Tarre; Dr. Arnold Kaminer; Dr. Charles Grose; Dr. Steve Redmond; W.R. Matson; D.A. Peguero; T.L. Richards; and Dr. D.B. Robbins.

OPINIONS BELOW

The opinion of the Court of Appeals, which was not published, is attached as Appendix A. The opinion of the District Court for the Western District of Washington, which also was not published, is Appendix B. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc is Appendix C.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals affirming the dismissal of petitioner's claims was entered on September 15, 1997. Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied in an order filed October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and, in particular, § 1132(a)(1)(B), which provides:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

STATEMENT OF THE CASE

After petitioner Robert Ficalora worked for International Business Machines, Inc. ("IBM") for eleven years, he developed chronic progressive multiple sclerosis ("MS"), a form of the disease that has a "steady downhill course." App. A 24. Mr. Ficalora applied for long-term disability benefits under the Medical Disability Income Plan, a plan funded and administered by IBM. IBM denied his application, claiming Ficalora had no clear diagnosis. Mr. Ficalora then underwent an Magnetic Resonance Imaging exam ("MRI") that established he had MS, and, in support of an administrative appeal of the denial, provided IBM with the results. He also wrote a

letter to IBM President Jack Kuehler, requesting "any help you can provide in my appeal."

IBM -- which was both the decisionmaker and the potential payor of over thirty years of disability benefits -- denied Mr. Ficalora's appeal. Its Plan Administrator, Mr. J. Sinnott, told him, "you had to get the President involved . . . we are not going to pay you for the rest of your life."

The stated basis for denial was that there was "insufficient objective medical information in the record indicating that, though Mr. Ficalora had MS, he was unable to 'take any employment for pay or profit.'" The only evidence supporting IBM's position that Mr. Ficalora could work was a 1991 note by Dr. Philip Swanson, a neurologist retained by IBM. App A 23. The note, written in the margin of a letter from IBM, stated that Mr. Ficalora had no "clear physical limitation."

IBM found that Dr. Swanson's note overcame the statements of Mr. Ficalora's treating doctors. One of those physicians, Dr. Roy Swank, of the Swank Multiple Sclerosis Clinic of Oregon Health Sciences University, had stated that Mr. Ficalora should retire due to his MS, that he was not "able to continue to do satisfactory work" and that he was "disabled now [and] in the foreseeable future." A second treating physician, Dr. Richard Blanck, opined that Mr. Ficalora's "physical limitations are permanent from a medical standpoint." The Social Security Administration

found Mr. Ficalora "incapable of performing any past relevant work." App. A 25.

Shortly after IBM denied benefits on January 21, 1993, Mr. Ficalora was again examined by Dr. Swanson, the neurologist originally retained by IBM. Dr. Swanson wrote on March 12, 1993:

> His neurological condition (multiple sclerosis) has progressed so that he now has some abnormalities on examination that were not present before. His symptoms are worsened by fatigue.
>
> I concur that he should seek retirement from his job at IBM.

Mr. Ficalora provided IBM this letter as part of an appeal of the benefit denial. IBM responded on March 19, 1993 that Dr. Swanson's "letter mentions 'abnormalities on examination,' but it does not say what those signs or findings actually were."

Five months later, on August 20, 1993, IBM offered "additional review" -- but only if Mr. Ficalora would agree to be examined by a new neurologist of IBM's choosing. Mr. Ficalora, believing this request was an attempt to obtain an opinion that would justify the previous benefit denial, responded that he would be seen by the doctors IBM had previously selected. IBM rejected that proposal. On February 14, 1994, IBM wrote to Mr. Ficalora "we have now reached a point where it appears

that there will not be agreement on any further review by the plan administrator."

Mr. Ficalora then filed suit in United States Court for the Western District of Washington, invoking that court's jurisdiction under 29 U.S.C. § 1132. IBM moved for summary judgment dismissal of the case, arguing that there was no basis for finding an abuse of discretion. In response, Mr. Ficalora argued that because the Plan Administrator operated under a conflict of interest, and because there was evidence tending to show that IBM's self-interest influenced its decision, heightened review was justified.

IBM answered with a declaration stating that Plan Administrator Sinnott "had no role in the ultimate decision" to deny benefits. The district court rejected Mr. Ficalora's assertion that Mr. Sinnott's statement was evidence that the benefit denial was influenced by IBM's conflict of interest, as required by Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317 (9th Cir. 1995). Accordingly, it applied the ordinary "abuse of discretion" standard of review, with no special weight given to the conflict of interest. App. B 8. Under that standard, it granted IBM's motion.

Mr. Ficalora appealed, but a divided panel of the Ninth Circuit affirmed. The Court of Appeals disagreed with the district court by finding that Mr. Ficalora "satisfied his burden" in the first stage of the Atwood

inquiry with Mr. Sinnott's statement, which it found to be "'material, probative evidence'" that the conflict "'caused a breach of the administrator's fiduciary obligations to [Mr. Ficalora.]'" App. A 5-6, quoting Atwood v. Newmont Gold, 45 F.3d at 1323. However, the panel majority determined that, at the second stage of the Atwood test, IBM had rebutted the showing that the conflict influenced its benefit denial. Following Atwood, it thus affirmed the district court's dismissal of Mr. Ficalora's suit by applying an ordinary abuse of discretion standard of review. Id.

Judge Pregerson dissented, finding that "the Plan Administrator abused his discretion." App. A 27.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve a Split Among the Circuits Regarding Standard of Review of Benefit Denials by ERISA Administrators or Fiduciaries Operating under Conflicts of Interest.

In Firestone v. Bruch, 489 U.S. 101, 115 (1989), this Court held that a denial of ERISA benefits challenged under 29 U.S.C. § 1132(a)(1)(B) should be reviewed de novo, unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits. If such discretionary authority is granted the administrator, review is for "abuse of discretion." Even under that standard of review, however, an administrator's conflict of interest must be considered:

> Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187, Comment d (1959).

Firestone v. Bruch, 489 U.S. at 115.

"Although all courts agree" that the decisions of a conflicted administrator "trigger a less deferential standard of review, the circuits are split on how this lesser degree of deference actually alters the review process." Buttram v. Central States Welfare Fund, 76 F.3d 896, 900, n.6. (8th Cir. 1996). When faced with an administrator or fiduciary

operating under a conflict of interest, the Fourth, Fifth, Seventh and Tenth Circuits use a "sliding scale" approach. The Fourth Circuit summarized this approach as follows:

> . . . the court modifies [the] abuse of discretion standard according to a sliding scale. The more incentive for the administrator or fiduciary to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator or fiduciary's decision must be and the more substantial the evidence must be to support it.

Ellis v. Metropolitan Life Insurance Co., 126 F.3d 228, 233 (4th Cir. 1997). See also Wildbur v. ARCO Chemical Co., 974 F.2d 631, 638 (5th Cir. 1992); Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987); and Chambers v. Family Health Plan Corp., 100 F.3d 818, 826 (10th Cir. 1996).[2]

The Eighth, Ninth and Eleventh Circuits have adopted an approach that the Ninth Circuit characterized as "very different" from the sliding scale. Atwood, 45 F.3d at 1322. See Brown v. Blue Cross & Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990), cert. denied, 498 U.S. 1040 (1991); Armstrong v. Aetna Life Insurance

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[2] A district court in the Sixth Circuit, after contrasting the Atwood v. Newmont Gold analysis and the sliding scale test, held the sliding scale test was most consistent with Sixth Circuit precedent. Best v. Nissan Motor Corp., 973 F. Supp. 770, 776 (M.D. Tenn. 1997).

Company, 128 F.3d 1263, 1265 (8th Cir. 1997). Rather than decreasing the deference given a conflicted administrator, Atwood requires a two-step "burden shifting" analysis. If the beneficiary can produce "material, probative evidence that a conflict caused the administrator to breach its fiduciary obligations," the administrator's decision is presumptively void and the burden shifts to the administrator to show the conflict did not affect its decision. Atwood v. Newmont Gold , 45 F.3d at 1323. If the plan administrator meets this burden, the court "ultimately appl[ies] a traditional abuse of discretion standard," and the conflict receives no further consideration. Id. at 1322.

The Atwood test thus permits the conflict to be removed from the analysis altogether -- as it was in this case, simply on the basis of a self-serving declaration of IBM's Plan Admin[illegible]tor. That result, however, is inconsistent with this Court's instruction that a conflict "must" be weighed as a factor in determining whether a fiduciary abused its discretion. Firestone v. Bruch, 489 U.S. at 115. This inconsistency was the reason for the Tenth Circuit's rejection of the Atwood approach:

> We reject the "presumptively void" test as inconsistent with . . . the Supreme Court's dictum in Firestone. We conclude that the sliding scale approach more closely adheres to the Supreme Court's instruction to treat a conflict of interest as a

> 'facto[r] in determining whether there is an abuse of discretion.'

Chambers v. Family Health Plan Corp., 100 F.3d at 826. The inconsistency was also noted in a dissent from the majority's rejection of the sliding scale approach in Armstrong v. Aetna, 128 F.3d 1263. Citing this Court's statement in Firestone v. Bruch that a conflict "must" be weighed as a factor, Judge Beam stated:

> It is difficult, if not impossible, to read this language from Firestone Tire contrary to the sliding scale approach -- under which the reviewing court always applies an abuse of discretion standard but decreases the amount of discretion given to the administrator's decision in proportion to the seriousness of the conflict -- established by the Fourth, Fifth, Seventh and Tenth Circuits.

Armstrong v. Aetna, 128 F.3d at 1267 (Beam, J.).

The Atwood test is not only inconsistent with this Court's direction in Firestone v. Bruch, supra, it is also unworkable and unrealistic. The first step of the test places a nearly impossible burden on a beneficiary. It is highly unlikely that the requisite "material, probative evidence" would be found by a beneficiary, as a plan administrator is unlikely to document the effect its self-interest had on its decision. Moreover, there is "an inherent tension between the requirement that the parties offer evidence proving the decision was (or was not) tainted by the conflict of interest, and the rule that review

of ERISA decisions is limited to the administrative record." Palmer v. University Medical Group, 973 F.Supp 1179, 1188 (D. Ore. 1997). See, e.g., Taft v. Equitable Life Assur. Soc., 9 F.3d 1469, 1471 (9th Cir. 1993).

The Ninth Circuit's decision in this case embodies the problem of Atwood's burden-shifting rule. As long as IBM was the potential payor of thirty years of disability benefits, it operated under an undisputed conflict of interest. That conflict could never be eliminated or disproved. Moreover, there was actual evidence that IBM's self-interest was involved: the Plan Administrator's statement that "**we** are not going to pay you for the rest of your life." However, because the court found no direct evidence that the IBM employee who made the final decision was included in the "we" used by his predecessor, the entire conflict evaporated from the analysis and was given no weight as factor in the ultimate determination of whether IBM abused its discretion. This despite the inherent difficulty of "proving" the influence of a conflict of interest.

Under the sliding scale approach, IBM's conflict of interest would have triggered a less deferential standard of review, requiring a "more objectively reasonable" decision by the plan administrator, supported by "more substantial" evidence. Ellis v. Metropolitan Life, 126 F.3d at 233. Such a review would have revealed that the record was all

but barren of evidence to support IBM's position that Mr. Ficalora could work, as demonstrated by Judge Pregerson's dissent. See pages A-12 through A-27.

Uniform national treatment of employee benefits is an "important policy underlying ERISA." Patterson v. Shumate, 504 U.S. 753, 765 (1992). The "continued well-being and security of millions of employees and their dependents are affected by [ERISA] plans." Central States Pension Fund v. Centr. Transp., 472 U.S. 559, 569 (1985) (quoting Congressional findings at 29 U.S.C. § 1001(a)). Presently, "there is no clear consensus on how to incorporate" a conflict of interest into the review process. Palmer v. University Medical Group, 973 F.Supp. at 1182. Uniformity of federal law regarding conflicted ERISA administrators should be established by granting certiorari here and determining whether Firestone's principles require the "sliding scale" approach used by most Circuits or the "very different" Atwood burden-shifting test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. FICALORA,	) No. 96-35229
	)
Plaintiff-Appellant,	)
	) D.C. No. CV-95-05342-RJB
v.	)
	) MEMORANDUM*
INTERNATIONAL BUSINESS MACHINES CORPORATION, a Delaware corporation licensed to conduct business in Washington; J. J. SINNOTT, IBM Plan Administrator; INTERNATIONAL BUSINESS MACHINES, INC., MEDICAL DISABILITY INCOME PLAN; CHASE MANHATTAN BANK, Trustee of MDIP; MICHAEL A. TARRE, MDIP Administrator; ARNOLD J. KAMINER; CHARLES D. GROSE, M.D.; STEVE REDMOND, M.D.; W.R. MATSON;	)

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

D. A. PEGUERO; T.L. RICHARDS; D. B. ROBBINS, M.D.

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted June 5, 1997
Seattle, Washington

Before: WRIGHT, PREGERSON and THOMPSON, Circuit Judges.

In 1980, International Business Machines (IBM) employed Robert A. Ficalora. In 1988, Ficalora began experiencing vision loss, fatigue, and numbness. After his doctor diagnosed him with multiple sclerosis (MS), Ficalora applied for benefits under IBM's Medical Disability Income Plan (MDIP or the Plan). The Plan Administrator denied Ficalora's request for benefits because Ficalora did not demonstrate that MS prevented him from being gainfully employed, as required by the Plan.

Ficalora then sued IBM in federal district court to enforce his right to benefits under the Plan, pursuant to Section 1132(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA). The district court granted summary judgment in IBM's favor, and Ficalora appeals.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

STANDARD OF REVIEW

A denial of benefits under ERISA should be "reviewed under a de novo standard unless the benefit plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). If an ERISA plan vests a plan administrator with such discretionary authority, however, "a district court may review the administrator's determination only for an abuse of discretion." Winters v. Costco Wholesale Corp., 49 F.3d 550, 552 (9th Cir.), cert. denied, 116 S. Ct. 276 (1995).

In the present case, the Plan provides:

> The Plan Administrator shall have full power and authority to determine all matters arising in the administration, interpretation and application of the Plan, not inconsistent with the provisions of applicable law, and its interpretation and decisions with respect thereto shall be final and conclusive ...

Ficalora argues that the district court erred when it applied an abuse of discretion standard of review because: (1) the Plan did not give the Plan Administrator the discretion to make benefits decisions, and (2) the Plan

Administrator's decision to deny benefits was influenced by a conflict of interest.

We disagree with both of Ficalora's arguments. We have repeatedly held that language similar to the language in IBM's Plan gives plan administrators the discretionary authority to determine eligibility for benefits. See, e.g., Canseco v. Construction Laborers Pension Trust for Southern California, 93 F.3d 600, 605 (9th Cir. 1996), cert. denied, 117 S. Ct. 1250 (1997) (trustee of plan "shall have the power to administer" the plan, including the power "to construe the provisions of the ... Plan" and "any such construction adopted in . . . good faith shall be binding"); Patterson v. Hughes Aircraft Co., 11 F.3d 948, 949 n.1 (9th Cir. 1993) (the plan administrator will issue a "written decision of approval or denial" including, in the event of denial a "clear reference to the Plan provisions upon which the denial is based."); Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 481 (9th Cir. 1990) (trustees shall have power "to construe the provisions of this Trust Agreement and the Plan, and any such construction adopted by the [trustees] in good faith shall be binding"); Madden v. ITT Long Term Disability Plan for Salaried Employees, 914 F.2d 1279, 1284 (9th Cir. 1990) (the Administration Committee "shall have the exclusive right . . . to interpret the Plan and to decide any and all matters arising hereunder, including the right to remedy possible

ambiguities, equities, inconsistencies, or omissions . . . [and] all interpretations and decisions of the . . . Administration Committee . . . with respect to any matter hereunder shall be final, conclusive and binding on all parties affected thereby.").

Under our precedent, the Plan Administrator's decision to deny Ficalora benefits is not subject to de novo review because it was not influenced by a conflict of interest. The parties do not dispute that a conflict of interest exists: IBM both employs the Plan Administrator and pays, either directly or through a fund, any benefits administered pursuant to the Plan.

To determine if a Plan Administrator's decision is entitled to a less deferential standard of review because of such a conflict, we employ a two-stage inquiry. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323 (9th Cir. 1995). In the first stage, we "must determine whether the affected beneficiary has provided material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the beneficiary." Id. Assuming that the beneficiary successfully satisfies this burden, in the second stage, "the plan bears the burden of producing evidence to show that the conflict of interest did not affect the decision to deny benefits." Id. If the plan

does not carry that burden, we must review de novo the plan administrator's denial of benefits. Id.

Ficalora satisfied his burden in the first stage of this inquiry by pointing to a statement made by James J. Sinnott while he was the Plan Administrator considering Ficalora's request for benefits. According to Ficalora, Sinnott stated: "we are not going to pay you for the rest of your life."

Nevertheless, the district court was correct in applying an abuse of discretion standard of review, because IBM satisfied its burden, in the second stage, of "producing evidence to show that the conflict of interest did not affect the decision to deny benefits." Atwood, 45 F.3d at 1323. The plan administrator ultimately responsible for denying Ficalora benefits was Michael A. Tarre, not Sinnott. And, nothing in the record indicates that Tarre was influenced by a conflict of interest.

We conclude that the district court properly applied an abuse of discretion standard of review.

II

DENIAL OF BENEFITS

An ERISA plan administrator such as Tarre abuses his discretion if he "relies on clearly erroneous findings of fact in making benefits determinations. Taft v. Equitable Life Assur. Soc., 9 F.3d 1469, 1473 (9th Cir. 1993) ; see also Atwood, 45 F.3d at 1323-24. Ficalora argues that

Tarre relied on a clearly erroneous finding of fact in making the benefits denial decision--Tarre's finding that Ficalora did not prove that MS prevented him from "the taking of any employment for pay or profit."[1]

IBM concedes that Ficalora adequately demonstrated he suffered from MS. Based on the evidence available to him at the time he made his decision, however, Plan Administrator Tarre did not clearly err in finding that Ficalora did not demonstrate that MS precluded Ficalora from engaging in any gainful employment. Dr. Swanson, the IBM physician who examined Ficalora, stated that Ficalora had "no clear physical limitation" that would prevent him from working, and nothing in the record establishes that Ficalora was completely disabled from working. Given this state of the record, Tarre did not clearly err in finding that Ficalora failed to prove he was incapable of performing any work for pay or profit.

---

[1]The Plan provides:

> An employee will be considered disabled by giving satisfactory proof to IBM that a disability from any cause prevents the taking of any employment for pay or profit.

III

EXTENT OF THE ADMINISTRATIVE RECORD

After Tarre completed his final review of Ficalora's application, he offered to perform an additional review to consider additional evidence, provided that Ficalora satisfied several conditions. When Ficalora failed to satisfy those conditions, Tarre refused to perform the additional review. Ficalora contends that his administrative record closed on February 14, 1994, the date when Tarre informed him that he would not be performing the additional review. See Taft, 9 F.3d at 1472 (holding that, to determine whether the Plan Administrator abused its discretion, a court of appeals may only review the evidence that was presented to the Plan Administrator as part of Ficalora's administrative record). In contrast, IBM argues that the administrative record closed on January 21, 1993, the date when Tarre issued his final denial of Ficalora's benefits request. Because the facts are not in dispute, only the contentions, we may resolve as a matter of law the issue of when the administrative record closed.

In our view, even assuming Tarre had the authority to offer to conduct an additional review, Tarre was only required to perform the review if he and Ficalora reached an agreement. Both the Plan and ERISA are silent as to how to interpret an offer of additional review by a Plan Administrator. However, "[i]t is well settled that when

ERISA is silent on an issue, [a court] may turn to state law to fashion the appropriate federal common-law rule." Hotel Employees & Restaurant Employees International Union Welfare Fund, 50 F.3d 719, 721 (1995); see also Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 386 (9th Cir. 1994). To determine whether the correspondence between Ficalora and Tarre ultimately resulted in an agreement that required Tarre to conduct an additional review, we therefore turn to traditional principles of contract law.

On August 20, 1993, Tarre offered to conduct an additional review, provided that Ficalora agreed to certain conditions. Ficalora accepted the offer on September 17, but conditioned his acceptance on several matters. Under settled principles of contract law, Ficalora's September 17 letter was a counteroffer, not an acceptance, because it imposed additional conditions. See Rorvig v. Douglas, 123 Wash.2d 854, 858 (1994) ("It is a basic rule of contract formation that an expression of assent that changes the terms of the offer in any material respect may be operative as a counteroffer; but it is not an acceptance and consummates no contract."); Strassburg v. Ricotta, 480 N.Y.S.2d 649, 650 (1984) ("under ordinary principles of contract law, a purchaser who has not yet subscribed [to] an agreement rejects it by the making of either a conditional acceptance or a counter offer."); Ardente v.

Horan, 117 R.I. 254, 259-60 (1976) ("An acceptance which is equivocal or upon condition or with a limitation is a counteroffer and requires acceptance by the original offeror before a contractual relationship can exist."); Landberg v. Landberg, 24 Cal. App. 3d 742, 750 (1972) ("qualified acceptance constitutes a rejection terminating the offer; it is a new proposal or counteroffer which must be accepted by the former offeror now turned offeree before a binding contract results.").

In response to Ficalora's counteroffer, Tarre wrote a letter dated November 15, 1993, in which he stated that IBM would be unable to meet one of Ficalora's conditions. Tarre also reworded Ficalora's other conditions, and asked whether Ficalora would still accept. For the same reason that Ficalora's September 17 letter was a counteroffer (it modified the terms of the offer by imposing additional conditions), Tarre's November 15 letter was a counteroffer as well.

In a letter dated November 19, 1993, Ficalora responded to Tarre's counteroffer with another counteroffer. In his letter of February 14, 1994, Tarre expressly rejected Ficalora's final counteroffer. Thus, Tarre and Ficalora never reached an agreement requiring Tarre to conduct an additional review. We conclude, therefore, that the administrative record closed on January 21, 1993, the date IBM finally rejected Ficalora's application for benefits.